

a

KOH CHEE KEAN

v.

TAN AH TONG

HIGH COURT MALAYA, KUALA LUMPUR

SITI NORMA YAAKOB J

b

[CIVIL SUIT NO. 198 OF 1982]

6 APRIL 1987

c

LAND LAW: *Contract - Sale and purchase agreements - Sale of land - Vendor sold land to third parties after agreements were executed - Third parties had notice of purchasers' interests - Land re-sold by third parties - Purchasers had paid purchase price - Whether purchasers had prior interest - Specific performance.*

d

There was a consolidated suit of separated actions instituted by the plaintiffs. Each of the plaintiffs had entered into separate agreements with the first defendant whereby they purchased land to build houses. They claim for specific performance of the agreements. The first defendant sold the land which was the subject-matter of the agreements to the second defendant subsequently. The plaintiffs had paid the purchase price to the first defendant. Although the second defendant was aware of the interests of the plaintiffs in the said land, they sold the land to an unsuspecting third party. Under the agreements, the first defendant had to obtain approval for the conversion of the land from agricultural land to housing land and sub-division. The first defendant had to complete the development of the land within 18 months upon obtaining those approvals and also the approval for constructing roads and drains. The agreement also provided that the plaintiffs pay the costs for developing the land after the approval of the lay-out plans had been obtained. However, the first defendant demanded for that payment 3 years before the approval was granted. Some of the plaintiffs paid the full sum demanded and some paid part of the sums demanded.

*e***Held:***f*

Specific performance of the agreements were ordered subject to the plaintiffs paying outstanding outgoings which were due under the agreement to the first defendant for the following reasons: the plaintiffs had fulfilled their obligations under the agreement, the second defendant had notice of the plaintiffs' interests, the third parties who had purchased the land from the second defendant should have ascertained the prior rights of the plaintiffs, and there was no evidence that damages would be an adequate remedy.

g

[Plaintiffs claims allowed with costs.]

Cases referred to:

Leong Gan & Ors. v. Tan Chong Motor Co. Ltd. [1969] 2 MLJ 8

Mosbert Berhad (In Liquidation) v. Chatib bin Kari [1985] 1 MLJ 162

Legislation referred to:

Evidence Act 1950, s. 92

h

Specific Relief Act 1950, s. 11(1)(c)

For the plaintiffs in CSF.198/82, CSF.206/82, CSF.268/82, CSF.285/82, CSF.237/83 and CSF.238/83 - Krishna Aiyar; M/s. Krishna, Menon & Partners

For the plaintiffs in OSF.1290/85 - K.L. Wong; M/s. K.L. Wong & Co.

For the plaintiff in CSF. 126/81 - Kathleen Chew; M/s. Nahappan & Partners

For the plaintiff in CSF.2/82 - Chandran Nair; M/s. Thevin Chandran, Siva & Jamal

i

For the plaintiffs in CSF.183/83 and F.198/83 - M. Mathialagan; M/s. Skrine & Co.

For the plaintiffs in CSF.371/83 - S.E. De Costa; M/s. Kassim, Tadin, Wai & Co.

For the plaintiff in F.22-383-86 - Y.H. Chan; M/s. Y.H. Chan & Mohan Ghandi

For the first defendant - Sam Oon Sum Chuan; M/s. Oon Wan & Partners

For the second defendant - Lee Pan Hoi; M/s. Steven Ti & Lee

JUDGMENT

Siti Norma Yaakob J:

The 22 plaintiffs in the 20 consolidated suits before me are purchasers of undivided lots of vacant land which form part of a 20 acre development project and which were held under 5 separate titles, all in the Mukim of Ulu Kelang, Selangor.

As purchasers, the plaintiffs, had entered into individual sale and purchase agreements with the first defendant who, in all the agreements, the earliest dated 1 November 1973 and the latest dated 21 January 1975, is described as a vendor of such properties but he has, since 1977, become the registered proprietor. All the plaintiffs had paid the purchase price of their respective lots in full and under the agreements, the first defendant had to obtain the necessary approval for conversion (as the titles of the lands were agricultural) and sub-division and the development of the land had to be completed within 18 months on the obtaining of such approval and the approval of the roads and drainage plans by the proper authorities.

In 1974, following the execution of the agreements with the plaintiffs, the first defendant demanded payment of not only the development costs from all the plaintiffs but also conversion and survey costs from some of them. The plaintiffs responded with most of them paying the development costs, either fully for the sums demanded or in part and one of them, the plaintiff in Civil Suit F. 2/82 had paid the full amount of the development, conversion and survey fees as demanded.

The approval for conversion and sub-division was obtained on 17 May 1977 and the approval of the roads and drainage plans must also have been obtained at the same time as a subsequent letter from the Land Office, Gombak, dated 20 May 1977 (AL1) refers to such approval being given in principle. Following this, the first defendant charged all the 5 titles to Perwira Habib Bank on 17 September 1977, as security for the term loan and overdraft facility extended by the Bank for the use and benefit of Asialand Housing Development Sdn. Bhd., the second defendant, the contractors who had undertaken the responsibility of developing the land.

Then on 18 March 1982, the first defendant transferred his title, rights and interests over the lands to the second defendant, in consideration of the second defendant transferring 648,288 of its shares to the first defendant as fully paid up and the first defendant also became its director. Under this agreement, (AD 2-5), the second defendant was made fully aware of the prior rights and interests of the plaintiffs but nonetheless, in 1982 and 1983, the second defendant decided to utilize the funds extended by the Bank to build houses on the lots that had already been sold earlier to some of the plaintiffs and offering such lots and houses for sale to unsuspecting third parties. Some of these lots and houses have been purchased by third parties and to prevent further construction on their lots and to protect their interests, some of the plaintiffs, particularly those represented by Messrs. Krishna, Menon and Partners applied and obtained an injunction against the first defendant and his agent, the second defendant on 15 June 1983, restraining them from dealing with their lots in whatsoever manner until the determination of their suits. That injunction has not been set aside to this day, the parties preferring instead to proceed to have their rights and interests determined. In addition to this injunction, the other plaintiffs have also lodged caveats over their respective lots as

a early as 1978 when they realized that the first defendant had not commenced or completed development on their lots within the time stipulated in their agreements despite making payments for such costs to him.

b In their respective suits, the plaintiffs primarily claim specific performance of the agreements they had entered with the first defendant but by virtue of AD 2-5, they seek the same remedy against the second defendant who has been added a party to the proceedings in Civil Suit F. 198/82 on 14 November 1985.

I summarise the issues raised at the trial under the following heads:

- c**
- (1) When does the liability to pay the development costs arise?
 - (2) Who has breached the sale and purchase agreements entered into between the first defendant and the plaintiffs?
 - (3) Is specific performance possible under the circumstances of this case?

d All the agreements executed by the plaintiffs with the first defendant contain identical terms and conditions with regard to the payment of the development costs with the exception that the rate of the development costs is not specified in some of the agreements whilst in others, the rate is limited to a sum not exceeding RM1.50 per sq. foot. This is contained in Clause 7(d) in all the agreements.

e The whole of Clause 7 of the agreements relates to the obligations of the first defendant towards the plaintiffs. These include the obligation to apply for conversion and sub-division in accordance with the proposed layout plans and that the expenses for such application shall be borne by the plaintiffs under Clause 7(a). Under Clause 7(b), the first defendant undertakes to develop the lands in accordance with the approved layout plans and such expenditure shall also be borne by the plaintiffs. Under Clause 7 (c), when separate individual titles have been issued for each lot, the first defendant shall transfer the same to the plaintiffs, free from all incumbrances and the costs of such transfers must again be borne by the plaintiffs, provided that the plaintiffs have paid the first defendant all monies due to him under the agreements, these being :

- f**
- (1) the purchase price which has already been settled in full by all the plaintiffs.
 - (2) the development costs which the first defendant maintains have not been settled fully by the plaintiffs to this day.
 - (3) the conversion, sub-division and survey fees which has been settled by only one plaintiff namely the plaintiff in Civil Suit F.2/82.
- g**

h Reading Clause 7 in its entirety, it is clear that the liability to pay development costs is spelt out in Clause 7(b) and such liability only arises after the proposed layout plans submitted under Clause 7(a) have been approved by the Land Office. This is clearly expressed in Clause 7(b) itself as it speaks of the development to be done in accordance with the approved layout plans. To that extent, approval for conversion and sub-division must be obtained first before the first defendant can demand payment of the development costs.

i What the first defendant did, however, was to demand payment in 1974, 3 years before the approval was granted in 1977, a cause of action which the first defendant had no right to do as the agreements do not provide for the payment of development costs in advance. This stands to reason as only upon such approval can the costs of such development be determined as costing is very much dependant on sub-division as it is only then that the area of the individual undivided lot is ascertained and from which development costs can

then be calculated. This is also to prevent any *ad hoc* quantification as had been done by the first defendant and the fact that he had done so clearly shows that he had made no proper projections of costs as he had so admitted when he stated that he only estimated the costs to be in the region of RM2 million.

The fact that the first defendant had demanded such payment in advance can only mean that he had no funds of his own to proceed with the development, much less pay for the lands as at that point of time, he was not the registered proprietor as he had so described himself in all the agreements. Even with the amounts that he had collected from some of the plaintiffs, he did not proceed with the development of the lots for which the payments were made. In all probability, the first defendant demanded development costs in advance to avail himself of the necessary funds to purchase the lands so that the titles can be registered into his name and as the registered proprietor, he can then charge them to a financial institution to raise the necessary funds to proceed with the project. This was what he eventually did but that only happened three years later in September 1977.

Having established that the plaintiffs' liability to pay development costs arises only after the approval for conversion and sub-division had been obtained, I now consider who has been in breach of the agreements.

The approval for conversion and sub-division was obtained on 17 May 1977 and under Clause 7(d), together with the approval of the roads and drainage plans which has been treated by the plaintiffs to have been obtained at the same time, the first development had to commence and complete the development of the sub-divided lots within 18 months of the date of such approvals, i.e. on or before 16 November 1978. As the first defendant should have demanded payments of the development fees from the plaintiffs after 17 May 1977, and there is no evidence that he had done so as he had regarded all along that he had every right to make the demands in 1974 and on his own admission that the development of the plaintiffs' lots has not been completed to this very day, there is therefore sufficient evidence to show that he had breached the provision of Clause 7(d).

He has never treated the agreements as being rescinded and in any event, the only circumstances when he can do so is under Clause 10(a) where there has been failure on the part of any purchaser to settle the balance of the purchase price or any other dues within the times stipulated. As the plaintiffs had paid the purchase price in full and there is no evidence that demands for payments of any other dues were made at the time when they were contractually due, the question of rescission does not arise altogether. Neither can I accept the first defendant's reasoning that by virtue of his transferring the rights and interests of the lands to the second defendant, he had clearly shown an intention to treat the agreements as rescinded. Rescission, if indeed there had been one in this case, must be communicated to the plaintiffs and since there is no evidence to that effect, the first defendant cannot raise the issue of rescission to escape liability for his action.

Having established that the first defendant was in breach of the agreements, can such agreements be specifically enforced? Under s. 11(1)(c) of the Specific Relief Act 1950, specific performance is only possible where it can be shown that damages will not be an adequate remedy. The defendants have not adduced any evidence that damages would be an adequate remedy and neither have they shown that they would be in a position to pay damages. On the contrary, the plaintiffs have shown that resulting from the acts of the defendants, particularly in constructing houses on some of the plaintiffs' lots and offering such lots and buildings for sale to unsuspecting third parties, the defendants had held themselves to be unscrupulous and fraudulent.

- a** The plaintiffs had purchased the vacant lots for the specific purpose of constructing their homes on their lands. They had already paid for such lots and some had even paid the development costs in 1974 as a sign of goodwill even though at that time they were not contractually bound to do so. The plaintiff in Civil Suit F. 2/82 had even paid development, conversion and survey fees for the full sums demanded by the first defendant but as against her the first defendant has testified that there is a further sum of RM46,332 to be paid towards development costs.
- b**

- All the plaintiffs have indicated that they are prepared to pay the development costs due or partly due from them provided they are calculated on rates applicable in 1978 and not on the current market rates. In this respect, some of the plaintiffs, particularly those whose agreements do not provide any rate of development costs had testified that following the letters of demand received by them in 1974, specifying the rates of development costs at 80¢ per square foot, they had discussed the matter with the first defendant and he had agreed to reduce the rate to 60¢ per square foot. This is evidenced by the letters P2, P3 and P4 where the first defendant had acknowledged the rate to be at 60¢ per square foot.
- c**

- The objection taken by the first defendant to this evidence is that it is inadmissible under s. 92 of the Evidence Act 1950. The exclusion of evidence under s. 92 only applies where the oral evidence sought to be relied on has the effect of varying and modifying the written words of a document. See the case of *Leong Gan & Ors. v. Tan Chong Motor Co. Ltd.* [1969] 2 MLJ 8. In this case, I consider that the oral evidence on the rates of development costs does not have such an effect and it was introduced for the sole purpose of establishing the rate of development costs to be paid as some of the agreements in question do not provide any rate whatsoever and to that extent, I hold that such oral evidence is not caught by s. 92 and is therefore admissible.
- d**
- e**

- Quite apart from those agreements which do specify any rates, there are the other agreements which have put a ceiling to the amount to be charged as development costs, i.e. a sum not exceeding RM1.50 per sq. foot. There is also evidence that in 1974 the first defendant had agreed to reduce the rate of development costs from 80¢ to 60¢ per square foot and that in all the letters of demand, he had clearly stated that the amounts asked for were only towards part payment, thus indicating that the final costs of development will exceed the 80¢ demanded. Since I have already decided that the right to demand the development costs can only be exercised after 17 May 1977, it is only just and proper that the rates of development costs should be the cost then prevailing in 1977. There is no evidence as to what that rate was in 1977 and in the absence of such evidence, I have only the ceiling rate as expressed in Clause 7(d) in some of the agreements.
- f**
- g**

- Considering that there had been a 3-year lapse since 1974 and in all probability, development costs would have escalated in 1977 as the property market then was booming when compared to the present and bearing in mind the works involved in such development, I consider that RM1.50 per square foot would not be too exorbitant a sum to demand by way of development costs. This must have been considered by the first defendant when the ceiling was added in some of the later agreements and to that extent, the sum to be charged as payment of development costs shall be RM1.50 per square foot.
- h**

- Whilst considering the remedy of specific performance, I have also not forgotten the rights, if any, of other third party purchasers who had purchased houses that have been partly constructed on some of the plaintiffs' lots. The issue for determination here is the priority rights of the affected plaintiffs as against the third party purchasers.
- i**

Reading Clauses 4, 5, and 8 of the agreement made between the first and second defendants at AD2 and 3, together with Clause 14 of the plaintiffs' agreements, it is very clear that the second defendant had due notice and was fully aware of the plaintiffs' rights and interests to their respective lots and being first in time their rights and interests cannot be challenged by anybody and the plaintiffs' rights and interests therefore rank in priority to the subsequent third party purchasers. See the case of *Mosbert Berhad (In Liquidation) v. Chatib bin Kari* [1985] 1 MLJ 162.

DW3, one of the third party purchasers admitted that when he purchased a lot with a house to be built on it on 16 June 1981, he was not aware that the particular lot had already been sold to one of the plaintiffs and that he had not checked the title to ascertain this fact. Evidence at AI28 clearly shows that the property in question had been caveated long before June 1981. To DW3 and the other third party purchasers, they have only themselves to blame for being too hasty in purchasing the land without first ascertaining the prior rights of the plaintiffs and their only remedy if any, lies with the second defendant but as against those plaintiffs whose lots they have purchased, they have no claim whatsoever.

In this respect they cannot insist on their entitlement to the lots they purchased by suggesting that the plaintiffs be resited pursuant to Clause 4 of the plaintiffs' agreements as the resiting envisaged by that clause can only be done where, as a result of the sub-division, the individual lots of the plaintiffs have been effected. As the approved layout plans, AB1, shows that that sub-division has not, in any way, effected any of the plaintiffs' lots other than to reduce the areas of 2 lots purchased by the plaintiffs of OSF. 1290/85, the question of resiting does not arise at all.

The defendants have also raised the objection that by reason of the special condition providing for bumiputra participation attached to the approval for conversion and sub-division, specific performance is not possible. Condition (vii) of Part III of the approval at AL3 states that at least 50% of the houses to be erected shall be sold to bumiputra and this also applies to purchasers who had purchased only vacant lot without houses. DW4, the Assistant District Land Administrator, Gombak, testified that in practice, the effect of such condition is to prevent registration of such lots purchased by non-bumiputras which exceed the 50% limitation as only the first 50% of lots purchased by non-bumiputras will be registered. In this case since the lands had been sub-divided into 81 lots and all the plaintiffs' lots can be identified on the approved layout plans, AB1, transfers affected by all 22 plaintiffs involving a total of 25 lots, will be registered as it is less than the 50% limitation imposed, thus making it possible for the agreements to be specifically enforced.

As a result of sub-division, the areas of two of the four lots purchased by two of the plaintiffs namely the plaintiffs in CSF. 1290/85 have become smaller in size. Since the purchase price of both the affected lots have already been paid based on the areas specified in the agreements, it is only just and proper that the defendants make a refund of that part of the purchase price representing the area in difference of the two affected lots at the rate of RM1.80 per square foot, the very same rate that was charged in the agreements.

From the circumstances of this case, as it is possible, both in law and on facts, to have the agreements entered into by the plaintiffs with the first defendant, specifically enforced I accordingly order the specific performance of such agreements upon the following conditions.

- (1) The development costs to be charged shall be at the rate of RM1.50 per square foot to be paid by the plaintiffs to the defendants with adjustments to be made in the case of those plaintiffs who have already paid part of such costs, within a month from date hereof.

- a* (2) The defendant shall, within a month hereof, demand payments of the conversion, the sub-division and survey fees from the plaintiffs in proportion to the area of the plaintiffs' sub-divided lots calculated on the amount claimed by the Land Office, Gombak, in AL1 and such demands shall be supported by the certificates from the defendants' accountant as to the correctness of the sums demanded. The plaintiffs shall make payments within a month of receipt of such demands by the defendants.
- b* (3) Any other outgoings that the plaintiffs are liable to pay under their respective agreements shall also be settled within 2 months from date hereof.
- (4) Provided that all the above dues have been settled by the plaintiffs in full within the times limited, the defendants shall transfer the respective lots to the plaintiffs within a month of the issue of separate individual titles, free all incumbrances and the expenses for such transfers shall be borne by the plaintiffs.
- c* (5) The defendant shall also refund to the plaintiffs in OSF. 1290/85 the amounts representing the area in difference of the two lots which had been reduced in area upon sub-division at the rate of RM1.80 per square foot, such refund to be made within a month hereof.
- As the plaintiffs have succeeded in their claims, I also order that the defendants pay the costs of the plaintiffs' actions.
- d*

Also found at [1988] 2 CLJ 69

e

f

g

h

i